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DEC 15 2008

OFFICE OF PETITIONS

In re Application of :
Danielsson, et al. :
Application No. 09/683,769 : DECISION
Filed: 12 February, 2002 :
Attorney Docket No. 6730.008.NPUS01 :
:

This is a decision on the petition, filed on 28 October, 2008, to revive under 37 C.F.R. §1.137(b) and alleging abandonment due to unintentional delay.

The petition under 37 C.F.R. §1.137(b) is **DISMISSED**.

Any request for reconsideration of this decision must be submitted within TWO (2) MONTHS from the mail date of this decision. Extensions of time under 37 CFR §1.136(a) are permitted. The reconsideration request should include a cover letter entitled "Renewed Petition under 37 CFR §1.137(b)."

This is **not** a final agency action within the meaning of 5 U.S.C. §704.

**As to the Allegations
of Unintentional Delay**

The requirements of a grantable petition pursuant to 37 C.F.R. §1.137(b) are the petition and fee therefor, a reply, a proper statement of unintentional delay under the regulation, and, where applicable, a terminal disclaimer and fee. (It does not appear that a terminal disclaimer and fee are required here.)

It appears that Petitioner has not satisfied the requirements of the regulation, to wit: The instant petition contains (on the first and unnumbered page) only a one-sentence statement that it is a request for reconsideration of an earlier decision and (on the second and unnumbered page) an authorization for extension of time. It further is noted that the two

pages contain distinctly different attorney docket numbers 6730.008.NPUS01 and 7589.328.PCUS00, respectively. Calls were placed to Petitioner on or about 30 November and 11 December, 2008, however, as of this writing Petitioner has not suggested a resolution of this matter.

Thus, Petitioner must provide the showing as to the nature of the delay, as discussed below. Petitioner also should satisfy himself that the reply to the 20 October, 2003, non-final Office action is a proper reply and indeed is of the form and substance Petitioner intends. This latter item is not to suggest a problem with Petitioner's submission, but rather to ensure/encourage a prompt, proper and complete resolution of this petition matter.

BACKGROUND

The record reflects that:

Petitioner failed to reply timely and properly to the non-final Office action mailed on 20 October, 2003, with reply due absent an extension of time on or before 20 January, 2004.

The application went abandoned after midnight 20 January, 2004.

The Office mailed the Notice of Abandonment on 23 July, 2004.

On 21 December, 2005, more than 23 months after abandonment and nearly 17 months after notice thereof, Petitioner filed via FAX (apparently under 37 C.F.R. §1.181) copies of a receipt card and claims, with no discussion of the facts and no explanation for the extended delays—Petitioner appears to have ignored the requirements set forth at 37 C.F.R. §1.181 and MPEP §711.03(c) regarding matters such as this for the filing of a petition within two months of the act complained of—a call was placed on 9 June, 2006, to Petitioner's offices to inquire about the matter, however, upon reaching the telephone number on the papers submitted by Petitioner in December 2005, the persons answering the call indicated that Petitioner had not been with the office for more than a year. Thus, it was not possible to inquire of the matter with Petitioner, and the petition under 37 C.F.R. §1.181 was dismissed on 12 June, 2006 (and Petitioner was given two months to reply).

On 10 October, 2007, Petitioner filed a petition (under 37 C.F.R. §1.137(b)) with fee, another copy of a receipt card and of an amendment and claims, set forth the regulatory statement of unintentional delay, but provided absolutely no explanation of the delay between the original due date of the reply to the non-final Office action mailed on 20 January, 2004, and the filing of papers (that the Office generously construed as a petition on 21 December, 2005); or of the

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delay between the decision mailed on 12 June, 2006, and the filing of the petition under 37 C.F.R. §1.137(b) 16 months later on 10 October, 2007. As indicated in the decision on that petition, there are three periods to be considered during the evaluation of a petition to revive, to wit: the delay in the:

- (1) reply that originally resulted in the abandonment;
- (2) filing of an initial petition to return the application to pending status; and
- (3) filing of a grantable petition to revive the application.

Because Petitioner made no showing at least as to periods (1) and (2), described above, the petition was dismissed on 17 March, 2008, and Petitioner was given two (2) months within which to reply.

More than 7 months later, on 28 October, 2008 (over a 17 October, 2008, certificate of mailing), Petitioner filed a petition. However, all that appears is a title page (styled as "Renewed Petition Under 37 C.F.R. [§]1.137(b)") and a second but unnumbered page authorizing the charge of fees for a five- (5-) month extension of time. Petitioner provided no substantive content to address the petition, and because the pages are unnumbered it is not possible to determine whether content might have been lost, not included or otherwise misplaced in Petitioner's process of submission. Nonetheless, the Office must address the petition as it appears in the record, and it appears that as of this writing Petitioner has provided no satisfactory showing as to the unintentional nature of the delay in the three period itemized above, as requested previously. Thus Petitioner should:

- Provide a satisfactory showing as to the unintentional nature of the delay in the three period itemized above, as requested previously;
- In addition, satisfy himself that a proper reply to the 20 October, 2003, non-final Office action has been submitted.

The availability of applications and application papers online to applicants/practitioners who diligently associate their Customer Number with the respective application(s) now provides an applicant/practitioner on-demand information as to events/transactions in an application. Thus, now if one wishes to know the progress in and/or status of an application or the accuracy of the data therein, one need only look at the file online.

Out of an abundance of caution, Petitioners always are reminded that those registered to practice *and* all others who make representations before the Office must inquire into the underlying facts

of representations made to the Office and support averments with the appropriate documentation—since all owe to the Office the continuing duty to disclose.¹

STATUTES, REGULATIONS

Congress has authorized the Commissioner to "revive an application if the delay is shown to the satisfaction of the Commissioner to have been "unavoidable." 35 U.S.C. §133 (1994).

The regulations at 37 C.F.R. §1.137(a) and (b) set forth the requirements for a Petitioner to revive a previously unavoidably or unintentionally, respectively, abandoned application.^{2,3}

CONCLUSION

The instant petition under 37 C.F.R. §1.137(b) is dismissed.

Further correspondence with respect to this matter should be addressed as follows:

By Mail: Mail Stop PETITION
 Commissioner for Patents
 P. O. Box 1450
 Alexandria, VA 22313-1450

By hand: U. S. Patent and Trademark Office
 Customer Service Window, Mail Stop Petitions
 Randolph Building
 401 Dulany Street
 Alexandria, VA 22314

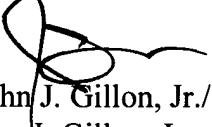
¹ See supplement of 17 June, 1999. The Patent and Trademark Office is relying on petitioner's duty of candor and good faith and accepting a statement made by Petitioner. See Changes to Patent Practice and Procedure, 62 Fed. Reg. at 53160 and 53178, 1203 Off. Gaz. Pat. Office at 88 and 103 (responses to comments 64 and 109)(applicant obligated under 37 C.F.R. §10.18 to inquire into the underlying facts and circumstances when providing statements to the Patent and Trademark Office). See specifically, the regulations at 37 C.F.R. §10.18.

² See: Changes to Patent Practice and Procedure; Final Rule Notice, 62 Fed. Reg. at 53158-59 (October 10, 1997), 1203 Off. Gaz. Pat. Office at 86-87 (October 21, 1997).

³ The language of 35 U.S.C. §133 and 37 C.F.R. §1.137(a) is clear, unambiguous, and without qualification: the delay in tendering the reply to the outstanding Office action, as well as filing the first petition seeking revival, must have been unavoidable for the reply now to be accepted on petition. (Therefore, by example, an unavoidable delay in the payment of the Filing Fee might occur if a reply is shipped by the US Postal Service, but due to catastrophic accident, the delivery is not made.) Delays in responding properly raise the question whether delays are unavoidable. Where there is a question whether the delay was unavoidable, Petitioners must meet the burden of establishing that the delay was unavoidable within the meaning of 35 U.S.C. §133 and 37 C.F.R. §1.137(a). And the Petitioner must be diligent in attending to the matter. Failure to do so does not constitute the care required under Pratt, and so cannot satisfy the test for diligence and due care. (By contrast, unintentional delays are those that do not satisfy the very strict statutory and regulatory requirements of unavoidable delay, and also, by definition, are not intentional.))

The centralized facsimile number is **(571) 273-8300**.

Telephone inquiries regarding this decision may be directed to the undersigned at (571) 272-3214—it is noted, however, that all practice before the Office is in writing (see: 37 C.F.R. §1.2⁴) and the proper authority for action on any matter in this regard are the statutes (35 U.S.C.), regulations (37 C.F.R.) and the commentary on policy (MPEP). Therefore, no telephone discussion may be controlling or considered authority for Petitioner's action(s).



/John J. Gillon, Jr./
John J. Gillon, Jr.
Senior Attorney
Office of Petitions

⁴ The regulations at 37 C.F.R. §1.2 provide:

§1.2 Business to be transacted in writing.

All business with the Patent and Trademark Office should be transacted in writing. The personal attendance of applicants or their attorneys or agents at the Patent and Trademark Office is unnecessary. The action of the Patent and Trademark Office will be based exclusively on the written record in the Office. No attention will be paid to any alleged oral promise, stipulation, or understanding in relation to which there is disagreement or doubt.